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No. 99-188

IN THE

Supreme Court of the United States

ERICH H. ADAMS, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DELTA AIR LINES, INC.

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QUESTION PRESENTED

Did the Second Circuit Court of Appeals properly affirm the district court's summary judgment dismissing Petitioners' age discrimination claims against Respondent Delta Air Lines, Inc. ("Delta") under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (the "ADEA"), where the conduct complained of was Delta's agreement with the Delta pilots' union to use Petitioners' flight engineer seniority at Pan American World Airways, Inc. ("Pan Am") to determine the order in which Petitioners were placed into the flight engineer slots created on the Delta pilots' seniority list for Pan Am cockpit personnel hired by Delta rather than attempting to re-order the relative seniority rankings of Pan Am cockpit personnel in a manner that Petitioners claim would have been more favorable to them?

STATEMENT PURSUANT TO RULE 29.6

Delta has no parent corporation and no publicly held company owns 10% or more of its stock.

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Appendix A — Asset Purchase Agreement Dated July 27, 1991 ..... 1a

Petitioners, plaintiffs and appellants below, are 71 former Pan Am flight engineers who were hired by Delta in 1991 in connection with Delta's purchase of certain Pan Am assets. During the time period in question, their ages ranged from 29 to 71. Petitioners alleged that Respondent Delta, defendant and appellee below, discriminated against them on the basis of their ages by agreeing with the union that represents Delta's pilots on a seniority integration methodology pursuant to which they were offered positions on the Delta pilots' seniority list that gave them less relative bidding seniority than they wanted.

Petitioners were offered slots on the Delta pilots' seniority list on the basis of a seniority integration methodology that was negotiated between Delta and the union that represents Delta's pilots, the Air Line Pilots Association International ("ALPA"), and was set forth in a supplemental collective bargaining agreement. Absent such a supplemental collective bargaining agreement — in which the existing Delta pilots relinquished some of their contractually protected relative bidding seniority, Delta would have been contractually obligated under the existing collective bargaining agreement to place all of the Pan Am cockpit personnel hired by Delta, including Petitioners, on the bottom of the Delta pilots' seniority list.

It is undisputed that, at all times relevant to the seniority integration, Delta and ALPA had agreed to use Pan Am seniority rankings, if Pan Am provided them, for the purpose of both hiring Pan Am cockpit personnel and placing them on the Delta pilots' seniority list. It is undisputed that Pan Am provided seniority rankings for pilots (Captains and First Officers) on one list and flight engineers on another list. It is further undisputed that the Pan Am pilots' seniority list

was used to hire Pan Am pilots and to fill the slots created for them on the Delta list, and the Pan Am flight engineers' seniority list was used to hire Pan Am flight engineers and to fill the slots created for them on the Delta list. Petitioners alleged in this case that Delta committed age discrimination by not re-ordering or combining the two separate Pan Am lists before filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list.

The district court judge granted Delta's motion for summary judgment dismissing Petitioners' age discrimination claims. *Adams v. Delta Air Lines, Inc.*, 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997). The district court held that even if Delta's then-Vice President of Flight Operations harbored "age bias," as Petitioners alleged, there was no link or connection between such bias and any adverse action against them on the basis of their ages. *Id.* at 620823, at *4. The Second Circuit unanimously affirmed in an unpublished opinion. 175 F.3d 1007 (2d Cir. 1999) (*per curiam)*; Petitioners' Appendix, 1-5.

The Court should deny Petitioners' request for a writ of certiorari not merely because the Second Circuit's decision was correct, but also because no legal issue worthy of the Court's certiorari review is presented by the Petition. The entire Petition is based upon the erroneous and unsupported assertion that there is a conflict between the Second Circuit's decision in the case and decisions of other United States Courts of Appeals. According to Petitioners, the Second Circuit held that "direct evidence of discriminatory animus on the part of a primary decision-maker" is "insufficient to raise an inference of discriminatory motive" (Pet. 12; *see also*, *id.* at i, 6-7, 10-12, 17-18), and this holding conflicts with decisions of other United States Courts of Appeals. *Id.* at 13-18.

The Second Circuit, however, held no such thing. The Second Circuit merely affirmed the district court's summary judgment after applying well-established law concerning burdens of proof in employment discrimination cases and concluding that there was no evidence of discriminatory conduct by Delta. There is no conflict between the Second Circuit's decision in this case and decisions of the other United States Courts of Appeals cited in the Petition, nor is the "Question Presented for Review" (Pet. i) actually presented by the Petition.

STATEMENT OF THE CASE

A. Factual Background

Petitioners' "Statement of Material Facts" (Pet. 2-10) is incomplete, and the factual assertions in their Petition are a significant distortion of the record evidence. A more complete statement of the undisputed facts relevant to the Petition is set forth below.

1. *The Asset Purchase Agreement Between Delta and Pan Am*

In January 1991, Pan Am filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. In July 1991, Pan Am and Delta entered into an Asset Purchase Agreement (the "APA"), dated July 27, 1991. Pursuant to the APA, Delta agreed to acquire certain equipment, route authority, and other assets from Pan Am. The equipment that Delta agreed to acquire in connection with the transaction included Airbus A-310 and Boeing B-727 commercial aircraft. APA, ¶¶ 2.1(b) and 2.2(b). The APA was approved by the United States Bankruptcy Court for the Southern District of New York on August 12, 1991. *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 447 (S.D.N.Y. 1994).

The APA provided that Delta would hire at least 6,600 Pan Am employees, including 700 Pan Am cockpit personnel, the approximate number required to operate the aircraft that Delta had agreed to acquire. APA, ¶¶ 5.9(a), (h). The APA obligated Pan Am to "provide to [Delta] a list of all employees in order of seniority and by . . . classification" (*id.*, ¶ 5.9(a)), and it required Delta to offer employment to the Pan Am pilots (Captains and First Officers) and flight engineers[1] "in seniority order by category." *Id.*, ¶ 5.9(h). The APA also provided that Delta could not offer employment to Pan Am's pilots and flight engineers unless and until Delta had reached an agreement with existing Delta pilots on the terms and conditions of employment that Delta would offer, including the methodology for placing the Pan Am pilots and flight engineers on the Delta pilots' bidding seniority list. *Id.*, ¶ 6.11.

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1. One of the two types of aircraft that Delta acquired in connection with the transaction, the B-727, requires a three-person cockpit crew, consisting of a Captain, a First Officer, and a flight engineer (Delta calls the person who occupies this position a "Second Officer"). The division of responsibility between these three cockpit crewmembers has been described as follows:

> The "captain" is the pilot and controls the aircraft. He is responsible for all phases of its operation. The "first officer" is the copilot and assists the captain. The "flight engineer" usually monitors a side-facing instrument panel.

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 114 (1985).

2. *Creating Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List*

Absent an agreement with the existing Delta pilots to create positions for the Pan Am pilots and flight engineers on the Delta pilots' seniority list, the collective bargaining agreement between Delta and the Delta pilots' union (ALPA) required that all of the Pan Am cockpit personnel hired by Delta be placed at the *bottom* of the pilot seniority list (like all new-hire pilots), *below all existing Delta pilots*. On August 30, 1991, Delta and ALPA agreed on a "modified status ratio methodology" that created slots for the Pan Am cockpit personnel on the Delta pilots' seniority list. The slots were spread throughout the Delta pilots' seniority list and generally corresponded to the cockpit jobs being created at Delta in connection with the asset acquisition.[2] This methodology was set forth in a supplemental collective bargaining agreement between Delta and ALPA.

3. *Delta's Hiring of Pan Am Pilots and Flight Engineers*

In the Asset Purchase Agreement with Pan Am, Delta agreed to offer employment, "in seniority order by category" as determined by Pan Am, to Pan Am pilots and flight

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2. The "modified status ratio methodology" agreed to by Delta and ALPA created ratioed slots for the Pan Am Captains beginning with the positions held by Delta Captains on similar aircraft on the Delta pilots' seniority list and ratioed slots for Pan Am First Officers and flight engineers among the remaining number of pilot positions that were projected to be existing at Delta as of December 31, 1992. The agreed upon methodology used the number of Delta pilot positions anticipated (before the Pan Am acquisition) as of December 31, 1992 to give recognition to the Delta pilots' expectations of significant planned job growth in the airline.

engineers who were or would become "fully trained and currently qualified" on either of the two aircraft types that Delta was acquiring by the closing date, November 1, 1991. APA, ¶ 5.9(h)(i). Unlike at Delta, where ALPA represented all cockpit personnel, Pan Am cockpit personnel were represented by two unions and had two seniority lists. ALPA represented the Pan Am pilots (Captains and First Officers), and the Flight Engineers International Association ("FEIA") represented the Pan Am flight engineers. The Pan Am pilots' seniority list was used for awarding Captain and First Officer positions at Pan Am, and the Pan Am flight engineers' list was used for awarding flight engineer positions at Pan Am.

Pan Am had numerous "professional flight engineers" who were not eligible to occupy any other cockpit position. They held positions only on the Pan Am Flight Engineers' seniority list, not on the Pan Am pilots' seniority list. Since new-hire pilots at Pan Am also filled the flight engineer position, typically early in their careers, some pilots at Pan Am serving as flight engineers were on both the flight engineer and pilot seniority lists. However, since only the Pan Am flight engineers' seniority list contained all Pan Am flight engineers, that was the list used for flight engineer bidding at Pan Am.

Delta, in contrast, hired only pilots and had only one seniority list. The entry level position for pilots at Delta was the B-727 flight engineer (or "Second Officer") position, but all pilots were eligible to bid out of the flight engineer position once they had attained adequate seniority.

Pan Am provided Delta with lists of all eligible pilots (Captains and First Officers) ranked in seniority order according to the Pan Am pilots' seniority list. Likewise, Pan

Am provided Delta with a list of all eligible flight engineers ranked in seniority order according to the Pan Am flight engineers' seniority list.

Delta offered Second Officer (flight engineer) positions on the B-727s being acquired from Pan Am to qualified Pan Am flight engineers based on their rankings on the Pan Am flight engineers' seniority list. Many of the Petitioners were relatively senior flight engineers at Pan Am. When they learned that Delta would be offering employment to B-727 flight engineers, they used their Pan Am flight engineer seniority to bid down from their flight engineer positions on the more senior and higher paying B-747 or A-300 aircraft to the B-727 flight engineer position so that they could become eligible to be hired by Delta as B-727 Second Officers.

Thus, while the B-727 flight engineer or Second Officer position, as an entry level position for new-hire pilots, is typically staffed by the youngest pilots, the average age of Pan Am flight engineers hired by Delta was closer to that of the Pan Am pilots hired by Delta. The average age of the 690 Pan Am pilots (Captains and First Officers) hired by Delta was 50 (median age 52). Their ages spanned from 27 to 59 (a federal regulation prohibits any person from occupying a Captain or First Officer position after the age of 60).[3] The average age of the 84 Pan Am flight engineers hired by Delta (which includes the 71 Petitioners in this case) was 48 (median age 50). Their ages spanned from 71 to 29 (with six of the 84 flight engineers being over age 60).

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3. 14 C.F.R. § 121.383(c).

4. *Filling the Slots for Pan Am Pilots and Flight Engineers on the Delta Pilots' Seniority List*

Since the APA obligated Delta to hire the Pan Am cockpit personnel in seniority order as determined by Pan Am, Delta and ALPA entered into a supplemental collective bargaining agreement that likewise required Delta to use the seniority order provided by Pan Am for filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list. Pan Am provided separate seniority lists for pilots and flight engineers. In accordance with its agreement with ALPA, Delta used the Pan Am pilots' seniority list to fill the Captain and First Officer slots and the Pan Am flight engineers' list to fill the flight engineer slots. While some of the Petitioners (those who were not "professional flight engineers") also held seniority positions on the Pan Am pilots' seniority list, that list was not considered in filling the flight engineer slots on the Delta seniority list because Petitioners were not eligible for hire as Captains or First Officers but only as flight engineers, and only the Pan Am flight engineers' seniority list contained all Pan Am flight engineers.

The order in which the Pan Am pilots and flight engineers filled the slots created for them on the Delta pilots' seniority list (like the creation of the slots themselves) made little difference to Delta. If Pan Am and its two unions had created a single seniority list that included all Pan Am cockpit personnel, pilots and flight engineers, Delta would have used that list in filling the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list. However, Pan Am could not get its pilots and flight engineers to agree to a single seniority list for all Pan Am cockpit personnel. Delta thus used the two lists provided by Pan Am to determine the

order of both hiring and placing the Pan Am cockpit personnel on the Delta pilots' seniority list.

The APA did *not* "require[ ] Delta to give Pan Am cockpit personnel written notice . . . of the terms and conditions upon which offers of employment would be made," as Petitioners assert. Pet. 3; *see also id.* at 5 n.3. Instead, the APA actually stated that Delta "shall advise Sellers [*i.e.*, Pan Am] in writing of the material terms and conditions upon which offers of employment to the selected Sellers' employees will be made." APA, ¶ 5.9(c)(i)(B). Delta did that. The supplemental collective bargaining agreement between Delta and ALPA was signed on August 30, 1991, *before* any Pan Am cockpit personnel was offered employment or hired by Delta.

B. The District Court's Decision

In responding to Delta's summary judgment motion, Petitioners alleged that Delta discriminated against them on the basis of their ages by agreeing with ALPA to offer them positions on the Delta pilots' seniority list according to their seniority rankings on the Pan Am flight engineers' seniority list. Petitioners argued that Delta should have done what they had been unable to do at Pan Am — combine the two separate Pan Am seniority lists, by either date of hire at Pan Am or its predecessors or by date of birth, and then use that new Delta-created list to fill the slots created for the Pan Am cockpit personnel on the Delta seniority list. Petitioners argued that Delta's failure to combine Pan Am's two separate seniority lists was due to its "age bias" against the Pan Am flight engineers.

Lacking evidence of discriminatory treatment, Petitioners attempted to avoid summary judgment by arguing, based on certain handwritten notes taken out of context, that Captain Harry C. Alger, Delta's then-Vice President of Flight Operations, was allegedly "biased" against older airmen. Captain Alger was one of several Delta officers who approved, on behalf of the company, the final seniority integration methodology negotiated between Delta and ALPA. Those same notes, however, were found by the Second Circuit to be inadequate to defeat summary judgment in *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.) (*per curiam*), *cert. denied*, 118 S. Ct. 626 (1997), which was an age discrimination claim filed by a purported class of Pan Am pilots who were 55 years of age and older and were *not* hired by Delta in connection with the 1991 asset acquisition. Petitioners' reliance on those notes in an attempt to show age discrimination made even less sense in this case because: (1) the notes had nothing to do with seniority placement; (2) all Petitioners were hired by Delta; and (3) the seniority placement itself actually favored older airmen over younger airmen within the respective groups of pilots (Captains and First Officers) and flight engineers.

The district court granted Delta's motion for summary judgment dismissing Petitioners' age discrimination claims. *Adams v. Delta Air Lines, Inc.*, 1997 WL 620823 (S.D.N.Y. Oct. 8, 1997). It is not true, as Petitioners repeatedly assert, that the district court dismissed their age discrimination claims "notwithstanding Petitioners' direct evidence of age-based discriminatory animus" merely because they could not "establish any adverse age-related effect" resulting from the integration methodology. Pet. 10, 11. Although the district court criticized Petitioners for failing to present any evidence

to support their assertion that they had been harmed based on where they had been placed on the Delta pilots' seniority list, the district court ultimately dismissed their claims because they could not show any connection or link between Captain Alger's alleged "age bias" and any adverse action against them on the basis of their ages. *See, e.g.*, *Adams*, 1997 WL 620823, at *4 ("What [Petitioners] fail to show, however, is a connection between the integration methodology adopted by Captain Alger (crediting [Petitioners] with the inference that Captain Alger unilaterally changed the [supplemental collective bargaining agreement]) and age-based bias."); *id.* at *4 n.9 ("[Petitioners] have failed to articulate any theory by which the integration advances a discriminatory motive. The mere fact that Capt. Alger was biased cannot, without more, defeat this properly supported summary judgment motion.").

C. The Second Circuit's Decision

Petitioners appealed the district court's dismissal of their age discrimination claims to the Court of Appeals for the Second Circuit. In an unpublished opinion filed on February 19, 1999, a panel of the Second Circuit unanimously affirmed the district court's grant of summary judgment dismissing Petitioners' age discrimination claims. 175 F.3d 1007 (2d Cir. 1999) (*per curiam*); Petitioners' Appendix, 3-4. The Second Circuit did not hold, as Petitioners mistakenly assert, that "direct evidence of discriminatory animus on the part of a primary decision-maker" is "insufficient to raise an inference of discriminatory motive." Pet. 12. The Second Circuit also denied Petitioners' motion for rehearing and suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

A. The Second Circuit's Decision Was Correct.

The ADEA makes it unlawful for an employer to discriminate against an individual "with respect to his compensation, terms, conditions, or privileges of employment[ ] because of such individual's age." 29 U.S.C. § 623(a)(1). Age discrimination laws were designed to prevent discrimination on the basis of stereotypes about age. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (the ADEA is designed to combat discrimination against older workers "on the basis of inaccurate and stigmatizing stereotypes" — *i.e.*, that "productivity and competence decline with old age."). Age discrimination laws, however, do not require an employer to give older employees preferential treatment. *See, e.g.*, *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982) ("The ADEA does not require an employer to accord special treatment to employees over forty years of age."), *cert. denied*, 459 U.S. 1103 (1983).

Each of the 71 plaintiffs alleged that Delta discriminated against him on the basis of his age when it offered him employment as a B-727 Second Officer with a position on the Delta pilots' seniority list among existing Delta Second Officers in the bottom portion of the Delta pilots' seniority list. While not challenging the location of the slots that were created for the Pan Am pilots and flight engineers on the Delta pilots' seniority list, Petitioners complain about Delta's failure to re-order Pan Am's separate pilot and flight engineer seniority lists into one list, arguing that if that had been done some of them would have filled higher slots occupied by Pan Am pilots.

1. The District Court Correctly Dismissed Petitioners' Age Discrimination Claims Under the *McDonnell Douglas* Burden Shifting Formula.

The district court correctly dismissed Petitioners' age discrimination claims when analyzed under the *McDonnell Douglas*[4] burden shifting framework, which was the only approach argued by the Petitioners in the district court. As an initial matter, Petitioners failed to establish a *prima facie* case of age discrimination based on the order in which the Pan Am cockpit personnel were placed into the slots created for them on the Delta pilots' seniority list. To make out a *prima facie* case, as the district court correctly stated, Petitioners were required to show, among other things, that they suffered an "adverse employment action," and that the action occurred "under circumstances giving rise to an inference of [age] discrimination." *Adams*, 1997 WL 620823, at *3 (citing *Woroski v. Nashua Corp.*, 31 F.3d 105, 108 (2d Cir. 1994)). This Court has emphasized that a "*prima facie* case [under the ADEA] requires '*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion. . . .*' " *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (emphasis in opinion) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Petitioners have not and cannot come forward with evidence to create such an inference.

Petitioners claim that Delta discriminated against them on the basis of their ages by agreeing with the existing Delta pilots, through ALPA, to use the Pan Am flight engineers'

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4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993).

seniority list to fill the slots created for the Pan Am flight engineers on the Delta pilots' seniority list. Petitioners, however, cannot show that the use of the two Pan Am seniority lists to fill the slots for the respective cockpit positions "giv[es] rise to an inference of discrimination." It is undisputed that use of the two Pan Am seniority lists within the relevant groups (pilots and flight engineers) ensured that the most favorable treatment generally went to the oldest members of each group.

Petitioners' argument, then, is that by using the separate Pan Am seniority lists for pilots and flight engineers, the agreement negotiated between Delta and ALPA treated older Pan Am *pilots* more favorably than it treated older Pan Am *flight engineers*. Even if the agreement treated older Pan Am pilots more favorably than it treated older Pan Am flight engineers, that fails to give rise to an inference of "age discrimination," since it is undisputed that the two groups had a roughly equivalent proportion of members throughout the age spectrum. Indeed, the 690 Pan Am pilots hired by Delta were, on average, *older* than the 84 Pan Am flight engineers hired by Delta. The difference in treatment between Pan Am pilots and Pan Am flight engineers was obviously not *age*, since both groups had roughly equivalent proportions of members throughout the age spectrum, but *position*.

As the district court correctly observed, Petitioners "have failed to show how that [the seniority placement] methodology was age-biased (as opposed to 'Flight Engineer' biased)." *Adams*, 1997 WL 620823, at *2 n.7. The Second Circuit reached a similar conclusion in *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291, 297-98 (2d Cir. 1992), where it affirmed a summary judgment dismissing an ADEA

challenge to the integration of two air cargo companies' seniority lists because "the motivating distinction" between the treatment of cockpit personnel on the integrated list "was the airline of origin," not age.

Petitioners complain that the final version of the supplemental collective bargaining agreement, which set forth the agreed upon seniority integration methodology, "radically altered" (Pet. 5) earlier unsigned, draft versions of the collective bargaining agreement, and that Delta's Captain Alger "had planned to and did unilaterally change" the seniority integration methodology. *Id.* at 6. This is not true. First, the APA between Pan Am and Delta obligated Pan Am to provide Delta with the seniority order of the cockpit personnel to be hired by Delta. APA, ¶¶ 5.9(a),(h)(i). Delta and ALPA recognized this fact by including in *every* draft and the final version of the supplemental collective bargaining agreement that Delta would fill the slots created for the Pan Am cockpit crewmembers on the Delta list "in the seniority order as defined by Pan American World Airways, Inc., and as conveyed to [Delta]." Earlier drafts included a default provision that stated *if* Pan Am failed to provide any seniority rankings and Delta was left without any way to rank the Pan Am cockpit personnel, Delta would use their dates of birth.[5] The default provision was removed

5. Re-ordering the Pan Am cockpit personnel by date of birth would have had the effect of completely scrambling the relative seniority rankings of both pilots and flight engineers, since neither the Pan Am pilots' seniority list nor the Pan Am flight engineers' seniority list was based on a date of birth ordering and both had been constructed by an arbitration award (which is described in detail in *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816, 818-21 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1030 (2d Cir. 1987)), following the merger of Pan Am and National Airlines, Inc. in 1980.

during the drafting process after it became unnecessary, *i.e.*, after Pan Am provided its seniority rankings in the form of two seniority lists, one for pilots and one for flight engineers.

Second, neither Delta nor Captain Alger had the right or the ability to impose "unilaterally" (Pet. 6) a seniority integration methodology on the Delta pilots' union, ALPA. The seniority integration methodology contained in the supplemental collective bargaining agreement between Delta and ALPA was the product of the collective bargaining process. Significantly, although ALPA also was named as a defendant, Petitioners have asserted no substantive claim against it.[6] Petitioners' evidence of alleged personal "age bias" on the part of Captain Alger, even if taken as true, is thus completely irrelevant. The fatal defect in Petitioners' age discrimination claims, the district court correctly held, was Petitioners' inability to show any connection or link between their evidence of alleged "age bias" and any adverse action taken against them on the basis of their ages. *Adams*, 1997 WL 620823, at *4.

Even assuming, *arguendo*, that each Petitioner had established a *prima facie* case of intentional age discrimination, such proof merely would have created a rebuttable presumption of discrimination that Delta could dispel by articulating a legitimate, non-discriminatory reason for its actions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 510-11. Delta easily met this burden by presenting

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6. The district court ordered that ALPA be joined as a defendant, pursuant to Fed. R. Civ. P. 19(a), because "ALPA has an interest in the validity and construction of the collective bargaining agreements which it negotiated and to which it is a signatory," and because "ALPA's presence may be necessary to protect the interests of its members who are not parties to this action."

undisputed evidence demonstrating that it filled the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list using the two Pan Am seniority lists because:

(1) Delta had agreed in the APA with Pan Am (APA, ¶¶ 5.9(a),(h)(i)), as well as in every draft and the final version of the supplemental collective bargaining agreement with its existing pilots, to follow Pan Am's determination of seniority.

(2) Early drafts of the supplemental collective bargaining agreement provided that if Pan Am failed to provide any seniority rankings to Delta, then Delta and ALPA would fill the slots on the Delta pilots' seniority list using the dates of birth of the Pan Am cockpit personnel. Pan Am, however, provided two seniority lists, thus making the "date of birth" default provision in the unsigned draft of the supplemental collective bargaining agreement inapplicable.

(3) A majority of the Pan Am flight engineers hired by Delta were "professional flight engineers" who held no position on the Pam Am pilots' seniority list. Thus, the only existing Pan Am seniority list that could be used to fill the flight engineer slots was the Pan Am flight engineers' seniority list.

(4) Delta's and ALPA's use of the Pan Am flight engineers' seniority list to fill flight engineers slots placed Petitioners, who were hired as B-727 Second Officers (flight engineers), among Delta pilots holding the same cockpit position.

(5) Combining the Pan Am pilot and flight engineer seniority lists and using such a new combined list to fill the slots would have required Delta to do what Pan Am and its two unions could not or would not do — reach an agreement on how to merge the two separate seniority lists — and would have reduced the seniority positions of similarly aged Pan Am Captains and First Officers relative to Delta Captains and First Officers.

Petitioners expressly conceded in the district court that Delta had articulated legitimate, non-discriminatory reasons for why it used the two Pan Am seniority lists to fill the slots. *Adams*, 1997 WL 620823, at *3. Delta's legitimate, non-discriminatory explanation for why it used the two Pan Am seniority lists destroyed any inference of discrimination that would have arisen if Petitioners had been able to establish a *prima facie* case. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

Once a defendant articulates a legitimate, non-discriminatory reason for its action, the plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253. The Court explained in *Hicks* that the articulated "reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515 (emphasis in opinion) (quoting *Burdine*, 450 U.S. at 253).

With regard to Petitioners' first burden, there is no evidence that any reason Delta has articulated for the use of the two Pan Am seniority lists is false. Petitioners made no

effort to dispute Delta's evidence that the slots created for the Pan Am cockpit personnel on the Delta pilots' seniority list were filled as they were for the reasons stated above.

With regard to Petitioners' second burden in proving pretext, there is no evidence that Delta was actually motivated to discriminate against Petitioners because of their ages by agreeing with ALPA to use the Pan Am flight engineers' seniority list to fill the flight engineer slots on the Delta pilots' seniority list. The APA required Delta to defer to Pan Am's determination of seniority. Moreover, there would be no benefit to Delta in the manner in which Petitioners were placed on the pilots' seniority list. Delta gained nothing by the placement of Pan Am flight engineers above or below Pan Am pilots. Bidding seniority only matters to those bid against. As far as Delta was concerned, the order in which the Pan Am cockpit personnel were placed on the Delta pilots' seniority list was a "zero sum" process.

Petitioners' argument, reduced to its essence, is that Delta engaged in unlawful age discrimination by not *ignoring* all seniority rankings at Pan Am. Petitioners claim that Delta should have unilaterally reordered the Pan Am pilots and flight engineers by date of birth, and then used that new order to fill all slots on the Delta pilots' seniority list, despite the wishes and protestations of the Pan Am pilots or ALPA.

For Delta to have attempted to create and use a combined Pan Am seniority list, where Pan Am, ALPA, and the FEIA had been unable to do so, would have disadvantaged similarly aged Pan Am Captains and First Officers and would have caused turmoil. If Delta had created and imposed a combined Pan Am seniority list based on date of birth or date of hire at Pan Am or its predecessors, some Petitioners would have

been placed higher on the Delta pilots' seniority list, and above or among some of the Pan Am pilots. This would have resulted in some of the oldest and most senior Pan Am flight engineers, who could not serve as pilots, being slotted among Delta's existing Captains and First Officers. As a consequence, some Pan Am pilots hired as Captains and First Officers would have been bumped down the Delta seniority list, reducing their ability to compete against original Delta pilots in bidding for the cockpit positions they were hired into once the three-year bidding restrictions were removed.[7]

The consequences of Petitioners' claims on the other Pan Am cockpit personnel confirm that this case involves nothing more than an internal struggle for seniority slots among former Pan Am pilots and flight engineers — a dispute that pre-dates any involvement by Delta. Those former Pan Am pilots whose seniority positions were targeted by Petitioners would no doubt claim that they should have higher slots than Petitioners because they were in a recognized higher category — *i.e.*, they were hired as pilots (Captains and First Officers) and Petitioners were not. Regardless of

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7. If Delta had placed the Petitioners in this case higher on the seniority list, as they now demand, it is likely that those Pan Am pilots whom they displaced would have attempted to assert their own claims against Delta for violating the supplemental collective bargaining agreement and disregarding the two Pan Am seniority lists. While those claims might have been as equally lacking in merit as Petitioners' claims here, the very nature of employee seniority rights frequently generates litigation. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953) ("Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement [on seniority] affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected.").

the respective merits of the squabble, it has nothing to do with Delta or age discrimination. Petitioners' real motive in filing this lawsuit was not to complain about alleged "age discrimination," but to try to use such a claim to achieve at Delta what their union, the FEIA, had been unable to do in negotiations with ALPA and Pan Am — merge the separate pilot and flight engineer seniority lists to their advantage.[8]

Because there is no age discrimination in this case, Petitioners' alleged evidence of "age bias" is irrelevant. Thus, the district court correctly dismissed Petitioners' age discrimination claims, and the Second Circuit correctly affirmed.

2. Petitioners Have No Direct Evidence of Age Discrimination and This Not a "Mixed Motive" Case Under *Price Waterhouse.*

In their Petition, Petitioners repeatedly argue that they presented "direct evidence" of age discrimination. *See, e.g.*,

8. Petitioners' use of an "age discrimination" theory is not a new tactic. Ironically, it has been tried before by Pan Am pilots, unsuccessfully, in *Cook v. Pan American World Airways, Inc.*, 647 F. Supp. 816 (S.D.N.Y. 1986), *aff'd per curiam*, 817 F.2d 1030 (2d Cir. 1987). In *Cook*, certain Pan Am pilots mounted a challenge under the ADEA to the Pan Am integrated seniority lists for pilots and flight engineers at Pan Am after Pan Am's merger with National Airlines, Inc. in 1980. As a result of that merger, all cockpit crewmembers, pilots and flight engineers, became Pan Am cockpit crewmembers. The plaintiffs claimed in *Cook*, like the Petitioners in this case, that they were victims of "age discrimination" because they were not ranked as high as they would have liked on the integrated seniority lists for pilots and flight engineers at Pan Am. The district court in *Cook* granted the defendants' motion for summary judgment and dismissed the plaintiffs' age discrimination claims, and the Second Circuit affirmed.

Pet. i, 6, 10, 11, 12, 16, 17. Petitioners' use of the term "direct evidence" is apparently meant to refer to the *Price Waterhouse*[9] mixed-motive analysis. The district court did not rule on whether Petitioners had made out a case of age discrimination under a *Price Waterhouse* mixed-motive approach because Petitioners never raised this argument in the district court. Petitioners have waived this argument, and they may not raise it for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

Even if Petitioners had properly preserved this issue for appeal, the district court's summary judgment order was still correct. Since Petitioners could not come forward with enough evidence to defeat Delta's motion under the *McDonnell Douglas* approach, they certainly did not come forward with enough evidence to shift the burden of proof to Delta under the more onerous *Price Waterhouse* mixed-motive approach.

In *Price Waterhouse*, this Court dealt with a mixed-motivation case, in which the plaintiff offered evidence, credited by the district court as factfinder, that a forbidden reason played a motivating role in the adverse employment decision. 490 U.S. at 235 (plurality opinion). The defendant presented evidence, also credited by the district court, that it also had legitimate concerns about the plaintiff's interpersonal skills. A majority of this Court concluded that if the plaintiff in a Title VII suit can establish that a prohibited discriminatory factor played a "motivating part" in the challenged employment decision, the defendant, in order to

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9. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

avoid liability, has the burden of proving "by a preponderance of the evidence that it would have made the same decision" even if it had not taken the discriminatory factor into account. *Id.* at 258 (plurality opinion); *see id.* at 259-60 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring). As the Second Circuit has made clear, "*Price Waterhouse* is thus a defense." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992).

Here, Petitioners presented no "direct evidence"[10] of age discrimination. Captain Alger had neither the right nor the ability to impose any seniority integration methodology on the Delta pilots or their union. Moreover, the Asset Purchase Agreement between Delta and Pan Am, and every draft of the supplemental collective bargaining agreement between Delta and ALPA as well as the final, signed agreement, provided that Delta was obligated to follow the seniority rankings as determined by Pan Am and as conveyed to Delta. The only relevant conduct or action was by Pan Am in furnishing Delta with separate seniority rankings for pilots and flight engineers. Even if Captain Alger were biased against older airmen, and he is not[11], there simply was no

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10. Direct evidence of discrimination is evidence which, if believed, would prove without inference or presumption that the affected employees were discriminated against. *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), *cert. denied*, 506 U.S. 826 (1992); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir.), *cert. denied*, 498 U.S. 848 (1990).

11. Although irrelevant for the reasons stated in the text, the comments in Captain Alger's notes do not reflect age bias. Captain Alger took these notes during a meeting with his counterpart at Pan

(Cont'd)

decision that he made, or action that he took, that even arguably could be called "age discrimination."

Thus, neither the district court nor the Second Circuit held that Petitioners had presented "direct evidence" of age discrimination. Instead, the district court held that Petitioners' inability to show any connection or link between Captain Alger's alleged "age bias" and any adverse action taken against them on the basis of their ages doomed their "age discrimination" claims. *Adams*, 1997 WL 620823, at *4. The *Price Waterhouse* "mixed motive" approach, even if properly preserved for appeal, does not apply. As the

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(Cont'd)
Am, Captain Daniel J. Affourtit, Jr., as part of Delta's initial fact-finding investigation of whether it should pursue a transaction with Pan Am. There is no dispute that during this meeting Captain Affourtit did the talking and Captain Alger merely listened and took notes. Captain Alger testified, "I'm taking notes . . . from listening to my counterpart." Captain Affourtit similarly testified that during this meeting he told Captain Alger "about Pan Am and its pilots and its facilities" and Captain Alger "took notes." Notwithstanding Captain Alger's notes, Delta agreed to pursue the transaction, agreed to hire qualified Pan Am flight engineers "in seniority order" (thus assuring that the most senior Pan Am flight engineers would be hired), and agreed with ALPA to place the Pan Am flight engineers on the Delta pilots' seniority list according to their flight engineer seniority at Pan Am (again assuring that the most senior flight engineers would receive the most favorable treatment). Moreover, the relative ranking of the Pan Am pilots and flight engineers on the Delta pilots' seniority list was an internal Pan Am issue rather than a concern of Captain Alger or Delta. Thus, the district court did not need to reach the issue of Captain Alger's alleged "age bias" to grant Delta's motion for summary judgment, nor did the Second Circuit need to reach this issue to affirm.

Second Circuit stated in *Ostrowski*, "[t]he *Price Waterhouse* issue does not arise for the trier of fact until the plaintiff has carried the burden of persuading the trier that the forbidden animus was a motivating factor in the employment decision. . . ." 968 F.2d at 181; *see also Raskin v. Wyatt Co.*, 125 F.3d 55, 60 (2d Cir. 1997) ("To warrant a *Price Waterhouse* burden shift, the plaintiff must initially show that an impermissible criterion was in fact a 'motivating' or 'substantial' factor in the employment decision.") (quotations omitted). No such evidence was presented.

Petitioners' problem under the *McDonnell Douglas* approach was that they had no evidence that the conduct complained of (Delta's agreement to use the Pan Am flight engineers' seniority list to fill flight engineer slots) was age-based. Having failed in this effort, they certainly have not come forward with sufficient evidence to shift the burden of proof to Delta under the *Price Waterhouse* "mixed motive" approach.

B. No Issue Worthy of the Court's Certiorari Review is Presented by the Petition.

Petitioners argue that the Second Circuit's unpublished *per curiam* opinion in this case "is in direct conflict with the decisions of several United States Courts of Appeals." Pet. 12. The predicate for this argument is Petitioners' assertion that the Second Circuit "ruled that Petitioners' direct evidence of discriminatory animus on the part of a primary decision-maker at Delta was insufficient to raise an inference of discriminatory motive." *Id.*

As demonstrated above, the Second Circuit neither held nor stated that "direct evidence of discriminatory animus on

the part of a primary decision-maker" for a defendant employer is "insufficient to raise an inference of discriminatory motive." As a result, the Second Circuit's opinion is not in conflict with the decisions of other United States Circuits Courts of Appeals discussed in the Petition (13-16).

Petitioners argue that if the Second Circuit's decision is allowed to stand, "the civil rights laws enacted for the protection of workers in this country will be effectively nullified." Pet. 17-18. This is sheer hyperbole. Petitioners are merely disappointed with the outcome of this case and have attempted to concoct a circuit conflict where none exists by misstating the Second Circuit's holding.

No novel, unique, or disputed issue of law is presented by the Petition. At most, Petitioners are merely complaining about the Second Circuit's analysis of the particular facts involved in this case. This Court has stated: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041 (1984) (Stevens, J.). Indeed, this Court has indicated that it is even less likely to review a case where, as here, the factual analysis and conclusion of the district court has received the concurrence of the court of appeals. In that situation, the Court has often stated that it is not "a court for correction of errors in fact finding," and that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *accord Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Here,

the district court and the Second Circuit have both concluded that Petitioners have failed to come forward with evidence that Delta discriminated against them because of their ages. Such "a very obvious and exceptional showing of error" is not present in this case.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ASSET PURCHASE AGREEMENT DATED JULY 27, 1991

ASSET PURCHASE AGREEMENT

AMONG

PAN AM CORPORATION,

PAN AMERICAN WORLD AIRWAYS, INC.

PAN AM SHUTTLE, INC.

AND

DELTA AIR LINES, INC.

JULY 27, 1991

Appendix A

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT dated July 27, 1991 among Pan Am Corporation, a Delaware corporation ("Parent"), Pan American World Airways, Inc., an indirect wholly-owned subsidiary of Parent and a New York corporation ("Airways"), Pan Am Shuttle Inc., a wholly-owned subsidiary of Parent and a Delaware corporation ("Shuttle"), debtors-in-possession (Shuttle and Airways being referred to herein collectively as "Sellers" and each individually as a "Seller"; where appropriate, the terms Seller or Sellers shall refer only to the applicable Seller), and Delta Air Lines, Inc., a Delaware corporation ("Buyer").

* * *

2.1.(b) *Aircraft.* Subject to obtaining the consent of the lessors, sublessors or mortgagees with respect thereto, up to 9 Boeing 727 aircraft listed on *Asset Schedule* 2.1(b)(i) (*provided* that if for any reason (including the failure to obtain any consent of a lessor, sublessor or mortgagee), Sellers are unable to deliver any of such aircraft designated by Buyer at the Closing free and clear of all Liens other than Permitted Liens, Buyer may at its option either substitute for such aircraft any other aircraft listed on *Asset Schedule* 2.1(b)(ii) or eliminate without replacement such aircraft from the Shuttle Aircraft to be delivered at Closing; and *provided, further*, that in the event Buyer is unable to obtain the five B727 aircraft

owned by Continental Airlines, Inc. that were formerly used in the Shuttle Service, Buyer may select up to 5 additional Aircraft listed on *Asset Schedule* 2.1(b)(ii) if the transfer of such additional aircraft (x) is not materially inconsistent with Sellers' ability to operate after the Closing, as presently contemplated and advised to Buyer in writing not later than August 15, 1991, and (y) does not materially delay the Closing with respect to the Shuttle Assets) fully equipped for revenue use and Federal Aviation Regulations Part 121 operations, in airworthy condition (except to the extent any such aircraft are undergoing routine maintenance pursuant to Sellers' maintenance program) and, subject to Section 5.21, in Sellers' all economy shuttle configuration (the "Shuttle Aircraft"), including the documents specified in *Asset Schedule* 2.1(b)(iii);

* * *

2.2.(b) *Aircraft.* Subject to obtaining the consent of the lessors, sublessors or mortgagees with respect thereto, the 21 Airbus A310 aircraft identified on *Asset Schedule* 2.2(b)(i) and up to 10 Boeing 727 aircraft selected by Buyer from the aircraft listed on *Asset Schedule* 2.2(b)(ii) and *Asset Schedule* 2.2(b)(iii) (*provided* that (i) the number of such Boeing 727 aircraft to be acquired by Buyer and the identification by tail number of such Boeing 727 aircraft shall be made by Buyer

no later than September 15, 1991, and (ii) if for any reason, (including the failure to obtain any consent of a lessor, sublessor or mortgagee), Sellers are unable to deliver their interest in any of the Boeing 727 aircraft designated by Buyer at the Closing free and clear of all Liens other than Permitted Liens, Buyers may at its option either substitute for such Boeing 727 aircraft any other Boeing 727 aircraft listed on *Asset Schedule* 2.2(b)(ii) and *Asset Schedule* 2.2(b)(iii) or eliminate without replacement such aircraft from the Airways Aircraft to be delivered at Closing), fully equipped for revenue use and Federal Aviation Regulations Part 121 operations and in airworthy condition (except to the extent any such aircraft are undergoing routine maintenance pursuant to Sellers' maintenance program) (the "Airways Aircraft"), whether owned, leased or subleased, including all the documents specified in *Asset Schedule* 2.1(b)(iii);

* * *

5.9. *Employees*. (a) As soon as practicable and in any event within seven days after the date hereof, Sellers shall provide to Buyer a list of all employees in order of seniority and by location and classification which list shall include the job title, salary, status (*i.e.*, whether the employee is active or on furlough or leave of absence or other status), employee number and date of hire of such persons. Such list shall be accurate to the best of

Appendix A

Sellers' knowledge and Seller shall supply on a weekly basis all changes with respect to the information set out therein. Sellers shall grant time off during working hours to any employee designated by Buyer to be interviewed, at times reasonably designated by Buyer, for possible employment.

* * *

5.9.(c)(i) Except where not practicable because of the constraints of foreign law and subject to (x) subsections 5.9(c)(ii) hereof and, with respect to pilots, 5.9(h) hereof and (y) to reaching the agreement with Buyer's pilots, as represented by ALPA, described in Section 6.11 hereof,

* * *

(B) By no later than August 15, 1991 Buyer shall advise Sellers in writing of the material terms and conditions upon which offers of employment to the selected Sellers' employees will be made; *provided* that Buyer may be unable to finalize all of the terms of seniority integration until after the Transferred Employees have been identified, in which case Buyer will provide a description of Buyer's objectives and intentions with respect

to seniority integration, as well as, a description of the seniority integration methodologies that Buyer is likely to use.

* * *

5.9.(h)(i) Buyer will offer employment to at least seven hundred (700) of Sellers' pilots, who must be fully trained and currently qualified in the Boeing 727 or Airbus A-310 categories (*i.e.*, Airbus A-310 Captain, Boeing 727 Captain, Airbus A-310 First Officer, Boeing 727 First Officer, Boeing 727 Second Officer) as of November 1, 1991 (subject to subsections 5.9(h)(ii) and (v) hereof), or such other date as may be agreed upon in writing by Buyer and Sellers, and who must meet all of Buyer's standards and requirements for pilots, including without limitation medical requirements, in order to be eligible for consideration by Buyer hereunder. Subject to subsections 5.9(h)(iii) and (vii), Sellers' pilots who meet such requirements will be offered employment with Buyer in seniority order by category. Except as provided in subsection 5.9(h)(ii), such offers shall be for employment effective upon the Closing. Buyer shall determine in its sole discretion the number of Sellers' pilots in each such category to whom Buyer will offer employment.

* * *

(vi) Buyer will meet with Sellers' pilots, as represented by ALPA and FEIA, at such times and locations as are determined by Buyer before entering into the agreement described in Section 6.11 hereof, in order to receive input and to help Buyer understand the issues considered by Sellers' pilots, as represented by ALPA and FEIA, to be significant with respect to such agreement, including the methodology for seniority integration. Buyer shall not be required to obtain the consent or agreement of Sellers' pilots, as represented by ALPA and FEIA, or of Sellers, as a condition to entering into the agreement described in Section 6.11 or as a condition to taking any other action pursuant to or in connection with this Agreement. It is expressly understood that this provision shall not create any contractual or other rights in favor of Sellers' pilots, as represented by ALPA and FEIA or otherwise, or any individual pilot, it being the sole purpose of this provision to allow Sellers' pilots, as represented by ALPA and FEIA, to present their views to Buyer.

* * *

6.11. *Labor Agreements*. Buyer shall have reached agreement with the Buyer's pilots, as represented by ALPA, concerning the terms and conditions upon which the offers of employment referred to in Section 5.9 hereof will be made to Sellers' pilots, including without limitation the methodology for determining seniority integration.

* * *

Appendix A

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed as of the date first above written.

DELTA AIR LINES, INC.

BY: /s/ Ronald W. Allen
Name: Ronald W. Allen
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

PAN AMERICAN WORLD AIRWAYS, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief Executive Officer

ATTEST: _____
Name:

Appendix A

PAN AM SHUTTLE, INC.

BY: /s/ T. G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief
Executive Officer

ATTEST: _____
Name:

PAN AM CORPORATION

BY: /s/ T.G. Plaskett
Name: Thomas G. Plaskett
Title: Chairman and Chief
Executive Officer

ATTEST: _____
Name: